

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.4836 of 1986

**

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

DHIRAJLAL J SHAH

Versus

STATE OF GUJARAT

Appearance:

MR SHAILESH C PARIKH for Petitioner
Mr.B.Y. Mankad for Respondent Nos.1 & 2
MR RJ OZA for Respondent No. 3
MR BIPIN I MEHTA for Respondent No. 4

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 14/12/98

ORAL JUDGEMENT :

The petitioner by filing this petition on 16.9.1986, under Article 226 of the Constitution of India has challenged the promotion of respondent no.3 dated 26.3.1984, as Divisional Accountant, on the basis of action being arbitrary, illegal, unconstitutional and violative of Articles 14 and 16 of the Constitution of India and against apprehended action of respondent, State

on the ground that in contravention of Rules, State is likely to promote respondent no.4 as Divisional Accountant.

2. Today, when the matter is heard the petitioner and the respondents 3 and 4 have retired from service.

The relevant dates are as under :

| Sl. no. | Incumbent Jr.Clerk | Date of appointment as Sr.Clerk | Sr.A/c Clerk | Sel.Gr. | Dy A/c |
|---------|-----------------------|------------------------------------|--------------|----------|--------------------|
| 1. | Petitioner | 26.09.59 | -- | 06.04.65 | 01.03.71 11.02.74 |
| 2. | Resp. 3 | -- | -- | 23.10.69 | not given 25.03.80 |
| 3. | Resp. 4 | 15.10.59 | 07.11.60 | 04.09.68 | not given 02.12.86 |

However,
deemed date
was given as
28.02.1972.

3. The petitioner's grievance is that so far as respondent no.3 is concerned he was given deemed date insofar as the post of the Deputy Accountant is concerned as 5.7.1977, which was cancelled by subsequent order dated 2.6.1986. Learned advocate for the petitioner submitted that respondent no.3 actually was promoted on 25.3.1980 as Deputy Accountant. He submitted that respondent no.3 could not have been promoted unless and until he completed five years of service. The petitioner and respondents nos.3 and 4 belonged to a common cadre of Accounts Group II. So far as the appointment from Accounts Group II is concerned, he submitted that it could be only on the basis of proved merit and efficiency. There is no dispute about the dates indicated against their names, as indicated hereinabove and that the petitioner and respondents nos.3 and 4 were holding the post of Deputy Accountant from the dates shown against their names in the column of Deputy Accountant. He drew the attention of the

Court to Part II of the Gujarat Panchayat Services (Classification and Recruitment) Rules, 1967. Part II refers to common Accounts Cadre. So far as Accounts Group I is concerned, the relevant provision is as under:

"Divisional Accountant/ Accountant/ Internal Auditor; appointment shall be made by promotion from amongst persons of proved merit and efficiency, who are holding posts shown in Accounts Group II for a period about 5 years and who have passed qualifying examination as may be prescribed by the Government."

4. Relying on the aforesaid rule, Shri Parikh submitted that respondent no.3 could not have been promoted on 26.3.1984 as Divisional Accountant. He submitted that he was actually promoted as Deputy Accountant on 25.3.1980. Naturally, therefore, he had not completed the period as mentioned in the aforesaid rule, namely, five years of service. It is also required to be noted that the phrase used is "who are holding the post". Therefore, the person must have worked on such a post for a period of about 5 years; only then he will fall under the zone of consideration and if on the basis of proved merit and efficiency he is found fit, only then he is to be promoted in Accounts Group I and not otherwise. There is no question of relaxation of any of the criteria, namely :

- (i) proved merit and efficiency,
- (ii) holding the post in Accounts Group II for a period of 5 years, and
- (ii) passing of qualifying Accounts Examination,

Merely because a deemed date was given for the post of Deputy Accountant as 5.7.1977 to respondent no.3, it could not be said that he has completed the period of 5 years as required. As a matter of fact on 12.9.1983, order was passed to the effect that respondent no.3 is given deemed date as of Deputy Accountant from 5.7.1977. However, the same was cancelled by order dated 2.6.1986. It is required to be noted that as per Rule, one must be holding the post for a period of about 5 years and only thereafter he will fall in the zone of consideration. Only after holding the post in Accounts Group II for a period of about 5 years and before that time, the

question of considering one does not arise. Respondent no.3 was promoted on 26.3.1984 as Divisional Accountant.

Shri Oza, learned advocate submitted that the petition should be rejected on the ground of delay and latches. So far as the relaxation is concerned, at the relevant time, there was no provision in the Rule. But Shri Oza, learned advocate submitted the the phrase used is "about five years" and not "minimum five years". He submitted that against the required period of 5 years, respondent no.3 has completed 4 years on the date when he was promoted as Divisional Accountant. The authority must have considered that period as sufficient period to comply with the Rule. In absence of requisite qualifying years being mentioned if it is mentioned "about 5 years", according to him 4 years experience can be considered by the authority as reasonable experience. Respondent no.3, was found suitable in accordance with the criteria of proved merit and efficiency and according to Mr. Oza, he had been rightly promoted. When the rule provides three criteria, i.e. (i) holding post for a period of about five years, (ii) passing the departmental examination and (iii) one must get through the test of proved merit and efficiency, one must comply with the same. In the rule there is no provision for relaxation of any of the criteria. Completion of four years cannot be equated with about five years. It must be nearer to five years. There may be a question of few days or weeks or couple of months. In case where eligible candidate is not available and for some more time is not likely to be available the words "about five years" is to be understood not in the strict sense of five years. Completion of four years cannot be equated with about five years. Therefore, the contention of Mr. Oza, learned advocate cannot be accepted.

He submitted that though respondent no.3 was promoted on 26.3.1984, the petitioner kept quite and satisfied himself by forwarding a letter of grievance to the authorities. It was for the petitioner to move the court within a reasonable period. Shri Parikh submitted that the Apex Court in the case of Ramchandra Shankar Deodhar and others v. The State of Maharashtra, AIR 1974 SC 259 has rejected the contention that delay of more than 10 or 12 years in filing the petition since the accrual of cause of complaint cannot be said to be a ground for rejecting the application. So far as delay is concerned in number of judgments the Apex Court has pointed out that it is the matter of discretion and it all depends on the nature of breach of fundamental right and the remedy claimed, and also how the delay arose.

The case on which Shri Praikh has relied was the case wherein there was reorganization of states and at the time of reorganisation, the petitioners were informed that the rules of recruitment to 1 the post of Deputy Collector in the reorganised State of Bombay had not yet been unified and that the petitioners continued to be governed by the rules of Ex- Hyderabad State and the Rules of 30th July 1959 had no application to them. It is under these circumstances they were justified in proceeding on assumption that there were no unified rules for the post of Deputy Collector and the promotions that were made by the State Government were only provisional and were to be regularised when the unified rules of recruitment were made. The Court pointed out that when Kapoor's case was decided by the Bombay High Court, the petitioners came to know that it was the case of the State Government in that petition and the case was accepted by the Bombay High court that the rules of 30th July 1959 were unified rules of recruitment to the posts of Deputy Collector applicable throughout the reorganised State of Bombay. The Apex Court pointed out that the petitioners thereafter did not lose any time in filing the petition.

In the instant case, there is no question that the petitioner came to understand the different criteria and under the bona fide belief he accepted the same, but as Shri Parikh submitted that the petitioner made grievance, which itself indicates that the petitioner was aware that the promotion given to respondent no.3 was not prejudicial. If that be so, then the petitioner ought to have moved the Court within a reasonable period. One should remember that equitable doctrine of laches cannot be forgotten and within the reasonable time the court must be approached after wrong happens of which the complaint is made. Not because of any statute of limitation, but because the courts have discretion in issuing writs and stale claim without any excuse shown for the delay cannot be allowed. One has to bear in mind that the petitioner has apparently acquiesced in the wrong complained of. Right to writ may in accordance with equitable principles be barred not only by laches, but by estoppel. Ordinarily, this High Court would be reluctant to interfere with the stale claims; because of the intervening period many equities spring up and without violence to the sense of justice such things cannot be set at naught retrospectively. The Apex Court in the case of Hari Singh and others v. State of U.P. and others, AIR 1984 SC 1020, wherein Notification under sections 4 and 17(4) of the Land Acquisition Act was the subject matter, in para 4 of the

said judgment pointed out as under :

"At the outset we are of the view that the writ petition filed in July 1982 questioning the notification issued in January 1980 after a delay of nearly two and a half years is liable to be dismissed on the ground of laches only. It is no doubt true that the appellants have pleaded that they did not know anything about the notifications which had been published in the Gazette till they came to know of the notices issued under section 9(3) of the Act, but they have not pleaded that there was no publication in the locality of the public notice of the substance of the notification as required by section 4(1) of the Act. It should be presumed that official acts would have been performed duly as required by law."

In case of *Trilokchand v. H.B. Munshi*, AIR 1970 SC 898, the Apex Court observed that the party claiming fundamental rights must move the court before others rights come into existence. The action of the courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court. To condone delay or not is one of discretion of the Court to follow from case to case. There is no lower limit and there is no upper limit. It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose. In case of *Roshanlal v. International Airport Authority*, AIR 1981 SC 597, where the writ petition was filed in 1978 challenging the validity of appointment made in 1975, the Apex Court refused to reopen the question on the ground that it would not be justified in doing so. Thus, the petitioner knowing full well that respondent no.3 has been promoted to the post of Divisional Accountant and he has not challenged the appointment within a reasonable period. The writ jurisdiction ordinarily should not be exercised on the ground of delay and laches the application must be dismissed.

6. Second facet of the petition is challenge to the action of the respondent/ Panchayat authorities insofar as giving deemed date to respondent no.4 is concerned, the same action is within a reasonable period. Shri Bipin Mehta, learned advocate appearing for respondent no.4 pointed out at Annexure 5 (Gujarati numerical) dated 2.12.1986 wherein it is specifically mentioned that J.C. Shah (respondent no.4) is given deemed date

as Deputy Accountant. However, as he has not worked as Deputy Accountant. He will be considered after completing the requisite experience in the cadre of Deputy Accountant in future for the post that may be required to be filled in the cadre of Divisional Accountant. The letter also indicates that he was given deemed date as Deputy Accountant from 28.2.1972.

7. It is required to be noted that the fact that deemed date was given by order dated 29.9.1986/14.10.1986 vide Annexure 'I'. Reading the order it appears that one, Shri B.D. Trivedi was junior to Shri J.C. Shah, respondent no.4, who was appointed as Deputy Accountant. Therefore, respondent no.4 was to be given date of appointment as of 28.2.1972 and the same was to be regularised. Thus, it is very clear that he was given benefit as Deputy Accountant from the date mentioned aforesaid, namely, 28.2.1972. There is nothing to show in the seniority list that he could have borne on that cadre on that date. Promotion with retrospective effect is permissible in such a case is a question. The Apex Court in the case of State of Bihar and others v. Sri Akhouri Sachindra Nath and others, AIR 1991 SC 1244, held that no person can be promoted with retrospective effect from the date when he was not borne in the cadre so as to adversely affect others. Shri Mehta could not point out anything as to how respondent no.4 was borne on that date in that cadre. In this view of the matter the order giving deemed date to respondent no.4 from 28.2.1972 in the cadre of Deputy Accountant requires to be quashed and set aside.

8. Shri Parikh submitted that the petitioner should have been given 26.3.1984 as deemed date for the post of Divisional Accountant as respondent no.3 was promoted as Divisional Accountant on 26.3.1984. For this purpose he has relied on the decision of the learned Single Judge in the case of V.N. Contractor v. State of Gujarat, 1998 (1) GLH 424. In that case the seniority list was wrongly prepared by the Government denying the petitioner his entitlement to work on promotional post. In the instant case there is no question of preparing seniority list or finalisation of the seniority list. But looking to the rule for the purpose of promotion to the post of Accountant Group I, it is clear that the person must be of proved merit and efficiency. The petitioner having completed 5 years in the cadre of Deputy Accountant, he can be said to be a person falling under the zone of consideration. He was required to be considered at that point of time. Shri Parikh further submitted that one post being vacant, respondent no.3

has been promoted on a roster point. Therefore, he would have been promoted and at least from the date on which respondent no.3 was promoted. As a matter of right, Mr. Parikh submitted that the petitioner ought to have been promoted and at least from the date on which respondent no.3 was promoted. The effect of deemed date should be given to the petitioner as Divisional Accountant. If the promotion would have been on the basis of criteria of seniority cum merit, the matter would stand on a different footing. But in the instant case criteria is proved merit and efficiency. It is not the case that the petitioner was the only person at the relevant time having 5 years experience. At the most he would be in the zone of consideration. There may be others, who might have completed 5 years or more, who may be falling under the zone of consideration. Therefore, all such persons were required to be considered for the purpose of finding out as to who should be promoted on the basis of proved merit and efficiency. It is not the case of the petitioner that he was the only persons having requisite experience. If he was not the only person, he cannot be promoted as there were others and the authority was required to consider the case of all, who were at the relevant time falling in the zone of consideration. Respondent no.3 having been appointed on 26.3.1984 as Divisional Accountant, it cannot be said that the petitioner should be given that date. His challenge is to the promotion of respondent no.3 on the ground that he did not complete the requisite period of 5 years. But it is not his case that he was not a person who could be said to be the person having better merit and efficiency. Merely because the Panchayat has committed a mistake which is not challenged within a reasonable period, it cannot be said that deemed date should be given to the petitioner. Had the petition filed by the petitioner within the reasonable period, considering the rule the court would have called upon the Panchayat to consider the case of not only of the petitioner, but the case of others who entered the zone of consideration. As the petitioner was not the only person to be considered, relief of deemed date cannot be considered.

9. Under the circumstances the petition stands partly allowed. Rule is made accordingly absolute.

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